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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 350

UNITED STATES OF AMERICA, *Petitioner*

v.

JOHN DONALD WALKER

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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STATUTE AND RULE

The National Stolen Property Act of May 22, 1934, c. 333, § 3, 48 Stat. 794, as amended by the Act of August 3, 1939, 53 Stat. 1178, 18 U. S. C. (1946 ed.) 415, now 18 U. S. C. (1948 rev.) 2314 2

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TO THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

It is respectfully submitted by the respondent that the petition of the United States for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, reversing respondent's conviction on two counts of an indictment charging him with transporting in interstate commerce money allegedly taken by fraud and with intent to steal, in violation of the National Stolen Property Act, be denied.

Opinions Below

The majority and dissenting opinions in the Court of Appeals (R. 463-471) are reported in 176 F. 2d 564.

Jurisdiction

The petitioner invokes the jurisdiction of this Court under 28 U. S. C. 1254(1).

Question Presented

The question presented by the petitioner, re-phrased, is: Is the wife of a defendant a competent witness against him in a criminal prosecution, over his objection to her competency, where she is not the victim of the fraud for which the defendant is being tried and where her testimony is offered by the government to prove an alleged similar fraud perpetrated by him against her?

Statute and Rule Involved

The National Stolen Property Act of May 22, 1934, c. 333, § 3, 48 Stat. 794, as amended by the Act of August 3, 1939, 53 Stat. 1178, 18 U. S. C. (1946 ed.) 415, now 18 U. S. C. (1948 rev.) 2314, provided:

> Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of $5,000 or more theretofore stolen, feloniously converted, or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen, feloniously converted, or taken, * * * shall be punished by a fine of not more than $10,000 or by imprisonment for not more than ten years, or both * * *.

Rule 26 of the Federal Rules of Criminal Procedure provides:

> * * * The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Statement

We desire to supplement the statement of facts given by the petitioner.

As to Mrs. Sally Grehan—whose testimony was introduced to prove an alleged similar fraud—she testified that the moneys that she gave to the respondent were loans to him (R. 311).

As to Mrs. Clara Duerr Walker, wife of the respondent, whose testimony the Appellate Court held incompetent—she testified that the moneys she gave her husband, prior to their marriage, were loans (R. 329).

There was no crime proven against the defendant either in the proof offered by Mrs. Sally Grehan or by Mrs. Clara Duerr Walker.

As to Mary Ashe—from whom the defendant obtained the money that led to the present indictment—the defendant used the money to a great degree for her as follows: she became the owner of a racing stable and became interested as a breeder (R. 65); she received jewelry costing at least $5,000 (R. 231); she received a Cadillac car costing over $3,000 (R. 92-93); her daughter received a car costing about $2,000 (R. 123) and there were many other items as well as everyday expensive living and traveling by both Mary Ashe and the defendant.

The indictment charged the transportation of approximately $26,000 (First Count) and of approximately $23,500 (Second Count), in each case the "sum" stolen (R. 5-6). The government proof showed that Mrs. Ashe received checks for those approximate amounts (R. 159, 163-164). It also showed, not the transportation of those checks or "sums" realized therefrom, but principally traveler's checks which the respondent purchased with the checks received from her (R. 169, 182, 187). The respondent thereafter spent large sums of money on Mrs. Ashe, and also for living expenses, as they both travelled together, sojourning in several states, back and forth from Texas (R. 70, 86, 91-92, 119, 120, 122).

Reasons for Denying Writ

The petitioner alleges error in the reversal of respondent's conviction (Petitioner's Brief, p. 6, Specification 3). It is sufficient answer that the Circuit Court had ample grounds for reversal, in addition to the ground of reversal challenged by the petitioner (the entire incompetency of the respondent's wife's testimony) because the government erroneously put in evidence a letter of the respondent to his wife Clara Duerr Walker—in clear violation of the well-recognized principle that confidential communications between husband and wife are privileged[1] (R. 327, Exh. 25A, 451). Of that letter, Chief Judge Learned Hand properly wrote (R. 467-468):

> "Although no part of what he told her after marriage can be considered as a confidential communication except a letter which he sent her on March 24, 1947, that was, not only 'confidential,' but extremely damaging. He had shipped her off to live in Alaska, and had left her substantially without money; he had gone through the form of marrying two other women

[1] Wigmore (3 ed.), Sec. 2332 et seq.

meanwhile, and he was still living with the second of these, preparing to fleece her, as he had fleeced her predecessors. Surely nothing was better calculated to arouse the detestation of the jury than the letter, with its protestations of continued love and its assurances that he was only awaiting the opportunity to be reunited with her. We should find it extremely difficult to write off the admission of this letter as 'harmless error' under Rule 52(a), even in a case where the guilt of the accused was so incontestably proved as here. * * *

"We need not say, however, whether we should have held that its admission was alone enough to compel a reversal of the judgment, because we hold that no part of the testimony of the witness was admissible anyway; and that for that reason the judgment cannot stand."

The Court below chose to reverse the conviction on a more fundamental ground, that the wife's testimony was wholly incompetent because the subject of the indictment against her husband did not involve an offense against her person. We have found no better exposition of the reasons for the retention of that centuries old rule than that given in this case (R. 468):

"It is always a debatable question how far any relevant evidence should be privileged. It deprives the party against whom the privilege is invoked of access to the truth; and a disclosure of the whole truth should be the prime concern of a court of justice. Whether in a given situation the interest of the privileged party in suppressing the truth, ought to outweigh that concern would seem to be a matter for Congress, and not for the courts. Moreover, unlike the spouse's disqualification as such [Funk v. United States, 290 U. S. 371] this conflict of interest is by no means one-sided, because, although it is not very usual for it to arise unless the spouses

> are estranged, not all estrangements are final, and nothing could more dispose the privileged spouse to treasure enmity and to repulse any overtures of reconciliation than the memory of what will ordinarily rankle as treachery. Nor is it either practicable or desirable to make the decision dependent upon the judge's conclusion that in the instance before him the marriage has already been so far wrecked that there is nothing to save. That was true, no doubt, here; but we must look beyond the case before us. The question will always arise in the progress of the trial; it must be decided at once; and its answer will introduce a collateral inquiry likely to complicate the trial seriously. The common-law avoided such an inquiry by taking divorce as the only test; and, while the privilege persists at all, there is every reason so to limit the exception."

There is no real conflict among the Circuits. As Chief Judge Learned Hand points out in his opinion herein [(R. 468)], the Second,[2] the Third[3] and the Sixth Circuits[4] all hold that, in a criminal case, a husband or wife may not testify against a spouse, over objection, unless there is involved an offense against the spouse's person, in which case it is held, without exception, that the wife is a competent witness.[5]

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[2] The case at bar.

[3] *Paul* v. *United States* (1935), 79 F. 2d. 561.

[4] *Brunner* v. *United States* (1948), 168 F. 2d 281; *Fraser* v. *United States* (1944), 145 F. 2d 139, also in the 6th Circuit, where the Court held a wife's testimony competent, although no offense against her person was involved, was not a criminal prosecution against her husband.

[5] *Kerr* v. *United States* (1926), 11 F. 2d 227 (9th Cir.); *United States* v. *Mitchell* (1943), 137 F. 2d 1006 (2nd Cir.); *United States* v. *Williams* (1944), 55 F. Supp. 375 (Minn.); *Wilhoit* v. *Hiatt* (1945), 60 F. Supp. 664 (Penn.); *Levine* v. *United States* (1947), 163 F. 2d 992 (5th Cir.); *Hayes* v. *United States* (1948), 168 F. 2d 996 (10th Cir.); *Shores* v. *United States* (1949), 174 F. 2d 838 (8th Cir.).

Only the Tenth Circuit has expressed a viewpoint differing from the holdings in the Second, Third and Sixth; and that viewpoint was a pronouncement essentially obiter dicta, for the wife was divorced when she testified.[6]

The federal rule,[7] excepting for the modifications noted, still makes a wife's testimony incompetent against her husband.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

November, 1949.

Respectfully submitted,

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[6] *Yoder* v. *United States* (1935), 80 F. 2d 665.

[7] *Griffin* v. *United States* (April 25, 1949, not yet officially reported), 69 Sup. Ct. 814, 819, bound the court below to adhere to the result reached in the case at bar.